Filed 3/9/10 The Lipoderm Institute v. MCOA Holdings CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE LIPODERM INSTITUTE, INC., et al., Plaintiffs and Respondents, v. MCOA HOLDINGS et al., Defendants and Appellants.	B212968 (Los Angeles County Super. Ct. No. BC377752)

APPEAL from an order of the Superior Court of Los Angeles County. Mary H. Strobel, Judge. Affirmed.

The Law Offices of Shawn A. McMillan, Shawn M. McMillan; Kathryn E. Karcher for Defendants and Appellants.

Yuhl Stoner Carr, Eric F. Yuhl, William E. Stoner, George K. Rosenstock; Musick, Peeler & Garrett and Cheryl A. Orr for Plaintiffs and Respondents.

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The trial court denied a special motion to strike specified causes of action in a complaint under the "anti-SLAPP" statute (Code Civ. Proc., § 425.16).[1] Defendants and appellants MCOA Holdings, Alan Hamel, James England, Anita Waxman, Harlan Kleiman, Ronald Rothenberg, M.D., and Beth Marmor (sometimes collectively defendants) challenge the ruling as to two causes of action—one for defamation and one for intentional infliction of emotional distress. The trial court determined that the conduct alleged by plaintiffs and respondents The Lipoderm Institute, Inc., Brian Sher and Lana Lien (sometimes collectively plaintiffs) was not activity protected by section 425.16.

We affirm. Defendants failed to satisfy their threshold burden of showing that the two causes of action arose from acts in furtherance of their constitutional right of petition or free speech.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties' Business Venture.

Plaintiffs and respondents are The Lipoderm Institute, Inc. (Lipoderm), a Delaware corporation, and individuals Brian Sher (Sher) and Lana Lien (Lien). Sher formed Lipoderm in June 2005 to offer treatment and solutions for menopause symptoms. Two months later, Lipoderm began advertising under the name Menopause Institute, LLC.

In July 2005, Lipoderm and Sher were introduced to defendant E.L.O. Corporation (ELO) and its sole equity owner, defendant and appellant Alan Hamel (Hamel). Defendant and appellant James England (England), an ELO officer and employee, and Hamel discussed the promotional services that ELO could provide through the efforts of Hamel's celebrity wife Suzanne Somers (Somers) in exchange for an equity interest in a joint venture with Lipoderm.

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[1] SLAPP is an acronym for strategic lawsuits against public participation. Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

In March 2006, Lipoderm and Sher on the one hand and ELO and Hamel on the other entered into an Operating Agreement of Menopause Institute, LLC (Operating Agreement) through which they became equal members and percentage interest holders of a Delaware limited liability company known as MCOA Holdings, LLC (MCOA). The goal was to position MCOA as the leading United States provider of menopause products and services. MCOA's business model required it to enter into alliances with physicians to operate medical clinics offering management of menopause symptoms and to franchise and duplicate those clinics across the country and beyond. According to the Operating Agreement, members had the exclusive authority, power and discretion to manage the business, and all actions, approvals or other decisions by the members were required to be made by a "Member Majority," defined as members whose collective percentage interests exceeded 50 percent. The Operating Agreement set forth specific requirements for the noticing and conducting of member meetings. It also included provisions for members to receive and inspect corporate documents.

MCOA's members, Lipoderm and ELO, unanimously appointed Sher as MCOA's chief executive officer, chief financial officer and director at an annual salary of $125,000, and Lien as MCOA's vice-president of research and operations, assistant secretary and director at an annual salary of $100,000. They were responsible for MCOA's day-to-day operations, which included hiring and terminating employees, negotiating and approving MCOA's expansion by affiliating with a Canadian company and negotiating and executing license agreements. They served in these roles until August 22, 2007.

MCOA proved to be successful initially, opening one clinic in 2006 and eight more in the United States through August 2007. It also entered into license agreements with Canadian physicians to provide services to several comparable clinics in that country. MCOA sought additional monies to accelerate its growth. Defendants and appellants Anita Waxman (Waxman) and Harlan Kleiman (Kleiman) agreed to raise approximately $3,750,000 million in capital through the issuance of a private placement memorandum (PPM) prepared by Kleiman's boutique merchant banking company,

Shoreline Pacific. The PPM described MCOA's goal of opening multiple new clinics and franchising its business model; it also indicated that MCOA's "success" would be dependent on Sher's participation.

Defamation and Intentional Infliction of Emotional Distress Allegations.

Lipoderm, Sher and Lien filed their initial complaint in September 2007, a first amended complaint the following month and a second amended complaint in February 2008. The operative third amended complaint (Complaint), filed in August 2008, alleged 19 causes of action.

With respect to the allegations at issue on appeal, the Complaint alleged that in July and August 2007, Waxman and defendant and appellant Beth Marmor (Marmor) falsely accused Sher and Lien, among other things, of embezzling MCOA's funds, forging physician signatures on prescriptions and forging a physician's signature on a condominium solicitation. The statements were published to ELO, Hamel, England, Kleiman, defendant and appellant Ronald Rothenberg, M.D. (Dr. Rothenberg) and Somers. None of the individuals who published or heard the statements conducted any investigation to assess or confirm their accuracy, and Sher and Lien were unaware of the statements at the time they were made.

The Complaint alleged that on August 17, 2007, Hamel, Waxman, England, Kleiman and Dr. Rothenberg participated in an "ultra vires" telephonic meeting, without notice to Sher or Lien, at which time Waxman published the foregoing defamatory statements. The Complaint further alleged that prior to and following the ultra vires meeting, "Defendants Marmor and Waxman falsely represented to Defendants Kleiman, England, Hamel, and Rothenberg that Plaintiffs Sher and Lien engaged in 'forgery,' and were not 'qualified to run the business,' had unlawfully used a rubber stamp on duplicate prescription forms, had unlawfully facilitated the shipment of prescriptions out of state, gave medical advice without a medical license, had made questionable wire transfers which suggested embezzlement, and other allegedly improper business practices. Plaintiffs are further informed and believe and thereon allege that Defendants Marmor and Waxman falsely represented to Defendants Waxman, England, Hamel, and Kleiman,

as well as celebrity promoter Somers that Plaintiffs Sher and Lien were engaged in unlawful business practices which exposed Defendant MCOA to liability." On the basis of Waxman's statements, at "the meeting participants purported to entertain a 'motion' purportedly 'proposed' by non-member Waxman and 'seconded' by non-member England on behalf of member ELO to 'terminate for cause' the services of Plaintiffs Sher and Lien." The Complaint alleged that the termination was null, void and unenforceable because action was not taken by a member majority.

The Complaint further alleged that at an August 22, 2007 meeting, Kleiman and England informed Sher and Lien that they were immediately relieved of their duties at MCOA because they had put the company at risk. Kleiman and England demanded Sher's and Lien's office keys and advised them they would not be permitted to return to the building and that security guards had been posted to prevent their entry. Security guards delivered Sher's and Lien's personal belongings to them while they waited outside the building. Thereafter, Kleiman and England advised MCOA employees that Sher and Lien had been terminated, informing some employees that they had been terminated for wrongful acts. According to the Complaint, the allegedly defamatory statements were made as a pretense to terminate Sher and Lien to force them to sell Lipoderm's equity interest in MCOA at a below-market value. Since Sher's and Lien's termination, all defendants allegedly made several unsound business decisions—without notice to or participation by Lipoderm—which have placed MCOA at risk.

The Complaint's 19 causes of action included claims for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, conversion, defamation, intentional infliction of emotional distress, intentional interference with contractual relations, intentional and negligent interference with prospective economic advantage, accounting and violation of Business and Professions Code section 17200. Sher and Lien alleged the eighth cause of action for defamation against Waxman, Kleiman, England and Marmor. According to that claim, each of the four defendants made verbal and written statements that were false, unprivileged and defamatory. The statements included, but were not limited to: (a) Waxman's, Kleiman's

and Marmor's August 17, 2007 verbal statements to England, Hamel and Dr. Rothenberg that Sher and Lien had embezzled MCOA's funds, had engaged in forgery of prescriptions and other documents and had engaged in illegal business activities; (b) England's August 22, 2007 verbal statement to Larry Van Horn that Sher had probably embezzled MCOA funds; (c) Kleiman's August 22, 2007 verbal statement to John Lackie that Sher had engaged in "egregious" wrongdoing relating to MCOA, implying criminal conduct; (d) Waxman's and Kleiman's verbal statements to Dr. Graham Simpson that Sher and Lien had embezzled MCOA funds and that their wrongful and illegal actions would become clear in time; (e) Waxman's verbal statement to Dr. Simpson that he should "watch out," implying Sher would engage in illegal acts as he had with MCOA; (f) Marmor's verbal statements to Patty Clark, Melody Nickerson, Larry Van Horn and others that Sher and Lien had embezzled MCOA's funds, had engaged in illegal activity regarding prescriptions and had engaged in other illegal business activities; (g) England's and Kleiman's posting a security guard at the MCOA entrance, which communicated to others that Sher's and Lien's presence at MCOA was for the purpose of trespassing and conducting other illegal activity; and (h) England's August 25, 2007 letter to Bank of America on behalf of ELO requesting that an account be frozen because of a concern that Sher and Lien may try to remove the funds, and Marmor's verbal statement to Bank of America that Sher and Lien had embezzled and would continue to embezzle MCOA funds. The Complaint alleged that the statements were false and unprivileged, and that defendants knew they were false or exhibited a conscious disregard of the statements' truth or falsity.

In the ninth cause of action for intentional infliction of emotional distress, Sher and Lien alleged that Hamel, England, Waxman, Kleiman, Dr. Rothenberg and Marmor conspired to terminate Sher and Lien on the basis of unverified allegations of misconduct, falsely accuse Sher and Lien of incompetence, fail to pay Sher and Lien wages owed at termination and preclude them from obtaining their personal belongings and MCOA documents. The Complaint further alleged that such actions were undertaken to cause

Sher and Lien emotional distress and that defendants' action were a substantial factor in causing Sher and Lien to suffer emotional distress.

Motion to Strike.

In October 2008, defendants filed a special motion to strike the second through fifth, eighth, ninth, eleventh and thirteenth through sixteenth causes of action. They argued that the Complaint alleged protected activity within the meaning of section 425.16, as the challenged statements were made and defendants' conduct was undertaken as part of the investigative process in anticipation of litigation. Defendants submitted Waxman's and Marmor's declarations in support of the motion to strike.

According to Waxman, when Sher asked her to help raise money for MCOA, she told him she would do so only as part of the MCOA board of directors. She attended a MCOA board meeting in October 2006 and later introduced Kleiman to Sher and Lien. Via a March 15, 2007 letter, Sher invited Waxman and Kleiman to be members of MCOA's board of directors. Waxman declared, however, that she was actually appointed to the board in October 2006 and Kleiman in January 2007. According to Waxman, Sher began acting strangely in April 2007, demanding money but refusing to provide the information she needed to obtain that money. In August 2007, MCOA vice-president of Alliances Pati Clark (Clark) reported to Waxman that Marmor, then MCOA's chief operating officer, was going to resign, that an employee had reported MCOA to governmental authorities for using unauthorized rubber stamps of a doctor's signature for patient prescriptions and that another employee was going to report MCOA to the Nevada labor board because Lien had mistreated her.

After discussing additional similar incidents with Clark and Marmor, Waxman took action. She declared: "I initially took this information to co-board member and director Harlan Kleiman. Together, we took this information to the rest of the board. We had two or three phone conversations discussing the implications of Sher's and Lien's behavior, and what course of action we should take. The board contacted the law firm [of] Loeb & Loeb to discuss our rights and responsibilities with respect to the troubling information we had discovered. Loeb & Loeb had previously been retained as corporate

counsel." She further averred that any board action related to Sher and Lien was pursuant to the advice of attorneys who participated in conference calls and that Waxman discussed the allegations against Sher and Lien with multiple employees "in anticipation of litigation and as part of the effort to further investigate the alleged conduct of Sher and Lien."

Marmor declared that she became MCOA's chief operating officer in May 2007 and resigned from that position on August 15, 2007. During her tenure she discovered that Sher had engaged in several troubling practices, including using rubber signature stamps on prescriptions, improperly shipping prescriptions out of state and providing a patient mailing list to one of MCOA's affiliated physicians. She informed certain board members that she was resigning because of her concerns about these practices.

Plaintiffs opposed the motion to strike on the grounds that the alleged acts were not in furtherance of defendants' right of petition or free speech. Plaintiffs submitted several declarations, deposition excerpts and exhibits in support of their opposition. Sher submitted a lengthy declaration that mirrored many of the Complaint's allegations. His declaration included information about the genesis of MCOA, the formation of the Operating Agreement, the initial success of MCOA's business model and MCOA's relationship with Waxman and Kleiman. Without disputing that Waxman and Kleiman served on MCOA's board of directors, Sher declared that any membership interest entitling them to a vote was contingent on them obtaining MCOA's proposed funding in the amount of $3.75 million. Waxman and Kleiman were unable to obtain any funding, but strongly objected to Sher's decision to appoint Lien as a co-chief executive officer.

On August 15, 2007, Sher terminated Marmor. Two days later, during a telephonic meeting in which Waxman, Hamel, England, Dr. Rothenberg and Kleiman participated, Waxman falsely accused Sher and Lien of embezzlement and forging prescriptions. One week later, Kleiman and England advised Sher and Lien that they were relieved of their duties at MCOA because they had put the company at risk. Although Kleiman and England also stated that Sher and Lien would receive a letter of explanation from counsel, no such communication ever arrived. Sher and Lien were then

locked out of MCOA's offices. According to Sher, defendants further defamed Lien and him by falsely representing to bank representatives that MCOA's bank account was at risk because Sher and Lien would improperly withdraw funds unless the account was frozen.

Lien's declaration similarly outlined the events of August 22, 2007 when she and Sher were not permitted to return to MCOA's offices. Lien also submitted a note from her doctor stating that the events of that day caused an acute exacerbation of her chronic autoimmune disease, which required ongoing steroid therapy.

In his deposition, England confirmed that several individuals discussed the allegations against Sher at what they called a board meeting. He believed that "there was a lot of activity and communications with Loeb & Loeb to determine if these [the acts allegedly committed by Sher and Lien] were unlawful or not." England, himself, had no knowledge as to whether Sher and Lien were submitting unsigned prescriptions or embezzling MCOA funds.

Kleiman testified at his deposition that he contacted Loeb & Loeb because he believed Sher and Lien "were doing illegal things that could cause a problem for the company and with regulatory agencies." Kleiman was precluded from answering any questions, however, regarding any specific advice he received from Loeb & Loeb regarding Sher's and Lien's termination.

Though she believed that Kleiman and England spoke with attorneys, Waxman testified that she never personally discussed the allegations against Sher and Lien with any attorney, nor did she undertake any investigation to confirm the accuracy of the allegations.

Graham Simpson, M.D., operator of MCOA's clinic in Reno, Nevada, declared that he personally signed all prescriptions issued by the clinic. He stated that he approved a system whereby duplicate prescriptions were faxed to MCOA's head office in San Diego for administrative record keeping purposes.

Larry Van Horn (Van Horn), MCOA's chief financial officer between November 2006 and September 2007, declared that he neither observed nor located any financial

improprieties during his tenure. Van Horn further declared that he learned from Marmor that Sher and Lien had been terminated, and England then told him that he believed Sher had embezzled money from MCOA. During the next one to two weeks, Van Horn worked with Herb Schmidt (Schmidt), ELO's chief accountant, who was coming in as Van Horn's replacement. Schmidt never told Van Horn that he found any evidence of embezzlement.

Following a November 13, 2008 hearing on the motion to strike—as well as other motions—the trial court denied the motion in its entirety. With respect to the eighth and ninth causes of action, the trial court couched its ruling in terms of whether the alleged statements and acts fell within the litigation privilege, Civil Code section 47. The trial court ruled: "As to the litigation privilege, although Waxman's declaration does indicate that MCOA eventually sought advice from its corporate counsel Loeb & Loeb, there is no evidence litigation was contemplated at the time the statements were made. While the litigation privilege has been extended beyond statements made in court proceedings to encompass those made in anticipation of litigation, that showing is lacking here. [¶] The [Complaint] alleges statements made and repeated shortly before and after Plaintiffs were fired. In her declaration, Waxman avers that she brought the allegations of wrongdoing to the attention of other board members, and had several conversations about what action to take. She further states 'The board contacted the law firm Loeb & Loeb to discuss our rights and responsibilities with respect to the troubling information we had discovered.' (Paragraph 13.) Notably, nowhere in Waxman's declaration is there an indication of when such a conversation with counsel took place. Waxman later states she was out of the country when Plaintiffs were terminated, but that she knows 'that all of the board's actions were pursuant to the advice of our attorneys who participated in many teleconferences where the above issues and investigation results were discussed.' [¶] The fact that Defendants conducted an investigation of alleged wrongdoing, and sought advice of counsel, does not in and of itself support a conclusion that the alleged defamatory remarks had a nexus to a proposed lawsuit. While Waxman states her investigation subsequent to the termination of Plaintiffs was 'in anticipation of litigation

and as part of the effort to further investigate the alleged conduct of Sher and Lien' this statement does not establish a sufficient nexus with anticipated litigation or appear to be in furtherance of defendants' access to the courts. (In fact it does not appear that Defendants initiated any such litigation.) The statements do not come within the litigation privilege. Defendants' motion to strike the 8th and 9th causes of action is DENIED."

The trial court likewise rejected the motion to strike's alternative argument that the allegations involved a public issue. Finally, though the trial court did not expressly rule on the parties' evidentiary objections to each other's evidence, it implicitly overruled those objections by relying on some of that evidence as the basis for its ruling.

This appeal followed.

DISCUSSION

Defendants contend that the trial court erred in denying their motion to strike because the challenged causes of action arose from constitutionally protected petitioning activity. We disagree. Defendants did not meet their burden to show that the conduct which formed the basis for plaintiffs' allegations involved petitioning activity within the meaning of section 425.16.

I. Legal Framework.

In 1992, the Legislature enacted section 425.16, the anti-SLAPP statute, in response to a "disturbing increase" in lawsuits brought for the strategic purpose of chilling a defendant's rights of petition and free speech. (§ 425.16, subd. (a).) A "SLAPP" is an unsubstantiated lawsuit based on claims arising from the defendant's constitutionally protected speech or petitioning activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60 (*Equilon*); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) The anti-SLAPP statute affords a "procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056 (*Rusheen*).)

Section 425.16 provides a means for the trial court to evaluate the merits of a possible SLAPP "using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

In evaluating an anti-SLAPP motion, the trial court must engage in a two-step process. (*Equilon, supra,* 29 Cal.4th at p. 67.) A defendant seeking the protection of the anti-SLAPP statute has the burden of making the initial showing that the lawsuit arises from conduct "in furtherance of [a] person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88.) The statute describes four categories of conduct that will qualify: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).) If the defendant makes the requisite showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) In making its determination on the motion, the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

Whether section 425.16 applies to a particular complaint presents a legal question which we review de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Equilon, supra*, 29 Cal.4th at p. 67.) Though we—like the trial court—consider the pleadings and supporting and opposing declarations submitted in connection with the motion, "'we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's

evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.]" (*Flatley v. Mauro, supra*, at p. 326; *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1267, fn. 2 [for purposes of analyzing a motion to strike under section 425.16, the court accepts as true the facts alleged in the complaint and considers the defendant's evidence to the extent it defeats as a matter of law the evidence submitted by the plaintiff].)

II. Defendants Failed to Meet Their Threshold Burden to Show the Challenged Causes of Action Arose from Protected Activity.

The eighth and ninth causes of action alleged that defendants falsely accused plaintiffs of embezzling MCOA funds, forging prescriptions and engaging in other illegal activity; they improperly terminated plaintiffs; and they improperly locked plaintiffs out of MCOA's offices. In determining whether a cause of action is subject to the anti-SLAPP statute, "we disregard the labeling of the claim [citation] and instead 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies' and whether the trial court correctly ruled on the anti-SLAPP motion. [Citation.]" (*Hylton v. Frank E. Rogozienski, Inc., supra*, 177 Cal.App.4th at p. 1272.) If the principal thrust of the claim—defined as the core injury-producing conduct upon which the plaintiff's claim is premised—does not rest on protected speech or petitioning activity, collateral or incidental references to protected activity will not trigger application of the anti-SLAPP statute. [Citation.]" (*Ibid*.) Here, we cannot conclude that the principal thrust or gravamen of plaintiffs' allegations "'fit[] [any] of the categories spelled out in section 425.16, subdivision (e)" and, therefore, the causes of action do not allege protected activity for purposes of the motion to strike. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78.)

A. Defendants Failed to Show Plaintiffs' Allegations Involved Conduct in Anticipation of Litigation.

Defendants contend they met their burden to show the eighth and ninth causes of action involved protected activity defined under section 425.16, subdivision (e)(2) as

"any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ."[2] Courts have broadly construed this subdivision to encompass communications preparatory to or in anticipation of the bringing of an action or other official proceeding. (*Briggs, supra,* 19 Cal.4th at p. 1115; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.) Nonetheless, "[t]he statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding." (*Paul v. Friedman, supra,* 95 Cal.App.4th at p. 866.)

The allegations supporting the eighth and ninth causes of action do not refer to any ongoing or contemplated litigation initiated by defendants. Moreover, plaintiffs submitted undisputed evidence that defendants never filed a judicial or other official proceeding, and defendants failed to offer evidence that they remained in the process of initiating or intending to initiate any litigation. But because courts have adopted an expansive view of what constitutes litigation-related activities under section 425.16, the court in *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268, stated that "although litigation may not have commenced, if a statement 'concern[s] the subject of the dispute' and is made 'in anticipation of litigation "contemplated in good faith and under serious

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[2] Defendants do not contend they met—nor would we find they could meet—their burden under any other subdivision. Section 425.16, subdivision (e)(1) requires that the statement be made before an "official proceeding authorized by law," a criteria which is not met by acts or statements that occur outside a legislative, executive, judicial or other official proceeding. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 865.) Subdivisions (e)(3) and (e)(4) mandate that the matter concern a public issue or an issue of public interest (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117–1118 (*Briggs*)), which, at a minimum, requires the defendant to show the allegations involve """"private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity""" (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1468).

consideration,"' [citations] then the statement may be petitioning activity protected by section 425.16."

Evidence purporting to demonstrate that defendants in good faith contemplated and seriously considered litigation was comprised of Waxman's declaration and England's and Kleiman's deposition excerpts showing that at unspecified points in time certain individuals associated with MCOA consulted with the law firm of Loeb & Loeb. Waxman declared that she received reports which caused her to suspect that Sher and Lien were embezzling from MCOA. She further declared that she "initially" shared her information with Kleiman and that "[t]ogether, we took this information to the rest of the board." She further declared: "The board contacted the law firm of Loeb & Loeb to discuss our rights and responsibilities with respect to the troubling information we had discovered. Loeb & Loeb had previously been retained as corporate counsel." She averred: "I know that all of the board's actions were pursuant to the advice of our attorneys who participated in many teleconferences where the above issues and investigation results were discussed." In her deposition, however, Waxman conceded that prior to making her report to the board she never personally contacted any attorneys or regulatory agencies to discuss whether Sher and Lien had engaged in illegal conduct.

England testified at his deposition that at about the time the information concerning Sher and Lien surfaced, "we interacted with Loeb & Loeb . . . and [they] gave us advice as to what was lawful, unlawful, et cetera, et cetera." Kleiman testified that he personally contacted Loeb & Loeb as a director of MCOA, because he believed Sher and Lien "were doing illegal things that could cause a problem for the company and with regulatory agencies." Without discussing any specific advice, he further stated that he sought legal advice from Loeb & Loeb about whether MCOA should terminate Sher and Lien. Neither England nor Kleiman testified that they discussed with Loeb & Loeb initiating any type of lawsuit against Sher and Lien.

Defendants failed to meet their burden to show that their statements at the board meeting and elsewhere, and their subsequent actions including terminating Sher and Lien and locking them out of MCOA's offices, were made in anticipation of litigation under

serious consideration. The evidence here falls short of that offered in *Neville v. Chudacoff, supra,* 160 Cal.App.4th 1255, where the challenged conduct involved a letter sent by an employer's attorney to the employer's customers accusing a former employee of breach of contract and misappropriation of trade secrets and advising the customers not to do business with the former employee so as to avoid any involvement in litigation that may ensue between the employer and former employee. (*Id.* at p. 1260.) The letter expressly stated that the former employee had violated his employment agreement and that the employer had notified him of the breach and intended to aggressively pursue its remedies. (*Ibid.*) The letter preceded the employer's lawsuit against the employee by four months. (*Id.* at p. 1269.) Under these circumstances, the court concluded that the defendant's conduct was made in connection with anticipated litigation, reasoning that the only reasonable inference from the evidence was that the employer was seriously and in good faith contemplating litigation against the former employee at the time it wrote the letter. (*Ibid.*)

The challenged conduct here is far more akin to that in *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280 (*20th Century*), where an insurance company alleged that the defendants engaged in a scheme to defraud by preparing false repair estimates and other documents in support of inflated insurance claims for earthquake damage. (*Id.* at p. 282.) Defendants moved to strike on the ground that the preparation of false and fraudulent damage reports implicated their right to petition. A declaration submitted in support of the motion averred: "[T]he damage reports 'were prepared for submission to clients and their legal counsel who ultimately submitted them to 20th CENTURY in support of their earthquake claims. The majority of these damages reports were prepared in anticipation of litigation. These damage reports often became the subject of discovery requests in pending lawsuits." (*Id.* at p. 284.) The Court of Appeal concluded that the defendants failed to meet their burden to show that the lawsuit fell within the protections of the anti-SLAPP statute. It reasoned: "While some of the reports eventually were used in official proceedings or litigation, they were not created 'before,' or 'in connection with an issue under consideration or review

by a legislative, executive, or judicial body, or any other official proceeding authorized by law.'" (*Id.* at pp. 284–285.)

Indeed, multiple cases have held that a defendant moving to strike must show that the cause of action arises from protected speech or petitioning the government for redress of a grievance. Although the anti-SLAPP statute must be construed broadly, the Legislature did not intend to apply the statute to purely private transactions merely having some remote connection to an official proceeding. (E.g., *Hylton v. Frank E. Rogozienski, supra,* 177 Cal.App.4th at p. 1272 [complaint by former client against his attorney alleging ethical violations and breach of fiduciary duty not protected, "[a]lthough petitioning activity is part of the evidentiary landscape within which [the] claims arose"]; *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1398–1399 [private attorney general complaint against insurer alleging claims mishandling and statutory violations not protected even though the complaint relied on an investigative report prepared by the Department of Insurance]; *Kajima Engineering & Construction Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 931 [city's complaint against contractor alleging claims associated with the contractor's improper bidding process not protected because it did not implicate the contractor's right to petition]; *Paul v. Friedman, supra,* 95 Cal.App.4th at pp. 865–868 [complaint by broker against former clients and their attorney brought after he prevailed in an arbitration not protected, as his claims sought redress for a harassing investigation and disclosures that were made outside the arbitration and allegedly exceeded the scope of permissible discovery].)

In the eighth and ninth causes of action, plaintiffs sought redress for allegedly false statements at a board meeting accusing Sher and Lien of misconduct, wrongful termination and wrongful exclusion from MCOA's offices. The gravamen of those claims involved conduct that did not arise from constitutionally protected petitioning activity, as the claims were too remotely related to unspecified anticipated litigation which never ensued. Defendants failed to make the necessary prima facie showing that their activity came within the protection of the anti-SLAPP statute.

B. Application of the Litigation Privilege Yields the Same Conclusion.

The trial court and the parties have evaluated whether the conduct alleged in the eighth and ninth causes of action occurred in anticipation of litigation by applying the principles associated with the litigation privilege, Civil Code section 47, subdivision (b). Though it is unnecessary to our disposition, we briefly discuss those principles, as we agree with the trial court that "[t]he fact that Defendants conducted an investigation of alleged wrongdoing, and sought advice of counsel, does not in and of itself support a conclusion that the alleged defamatory remarks had a nexus to a proposed lawsuit."

Civil Code section 47, subdivision (b) defines a privileged publication as one made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . ." In *Neville v. Chudacoff, supra,* 160 Cal.App.4th at page 1262, the court observed that while parties often assume whether a statement is protected activity under section 425.16, subdivision (e)(2) is determined by ascertaining whether the statement is privileged under Civil Code section 47, subdivision (b), "[t]hat assumption is not correct because the two statutes are not coextensive." But because there is a relationship between the litigation privilege and the anti-SLAPP statute, California courts "have looked to the litigation privilege as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry—that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision (e)(1) and (2)." (*Flatley v. Mauro, supra,* 39 Cal.4th at pp. 322–323.)

In *Rohde v. Wolf, supra,* 154 Cal.App.4th at page 36, the court applied authority involving the litigation privilege to determine whether a letter was a protected communication under section 425.16. The *Rohde* court stated: "[T]he privilege 'arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute.' (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 39.) A later

case noted that *Edwards* 'does not hold or suggest that a complaint must be drafted before the privilege will apply.' [Citation.] '[T]he question in *Edwards* was not "imminentness," but remoteness . . . "imminency" is not an issue in the case of a classic demand letter . . . the litigation privilege is not conditioned upon an "imminency" requirement separate from the requirement that prelitigation statements be made in serious and good faith consideration of litigation.' [Citation.] Recently, the Supreme Court stated that '[a] prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration. [Citations.]' (*Action Apartment Association, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.)" (*Rohde v. Wolf, supra,* at p. 36.)

As discussed above, evidence showing that defendants consulted attorneys at about the same time they were investigating allegations of misconduct and terminating Sher and Lien did not satisfy their burden to show that they seriously and in good faith contemplated litigation. Waxman's statements in her declaration that the board's "conduct was undertaken in anticipation of litigation" were likewise insufficient. As aptly stated by the court in *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 33 (*Edwards*): "More than a mere possibility or vague 'anticipation' of litigation must be required for the privilege to attach, or else the privilege may be misused in ways for which there is no public policy justification or purpose. To paraphrase the words of the Restatement, the 'bare possibility' that a judicial proceeding 'might be instituted' in the future 'is not to be used as a cloak to provide immunity' for fraud and other tortious conduct when the possibility has not ripened into a *proposed* judicial proceeding that is contemplated in good faith and under serious consideration. [Citation.]" The *Edwards* court further reasoned that the extension of the privilege to prelitigation communications in no way changed the underlying rationale for the privilege, which "is based on a policy of encouraging *free access to the courts* for assistance in the resolution of disputes and the ascertainment of truth, without fear of incurring a derivative tort action." (*Id.* at p. 33.)

In *Edwards*, the homeowner plaintiffs wrote to the builder defendants, informing them of cracks in their home foundations and asking that the cracks be investigated and repaired. (*Edwards, supra*, 53 Cal.App.4th at pp. 23, 37–38.) The defendants responded without disputing or denying their obligation to repair, and their communications with the plaintiffs were focused on investigating, diagnosing and repairing the faulty foundations. (*Id*. at pp. 23–25, 38.) None of the communications suggested or hinted at threatened litigation, or even implied any type of settlement demand. Explaining that the litigation privilege affords protection to a communication related to "a *proposed* judicial or quasi-judicial proceeding," (*id*. at p. 34) the *Edwards* court determined that the communications at issue failed to demonstrate that the plaintiffs in fact proposed resorting to the courts to settle their disputes. The court reasoned: "[A] lawsuit or some other form of proceeding must actually be suggested or proposed, orally or in writing. Without some actual verbalization of the danger that a given controversy may turn into a lawsuit, there is no unmistakably objective way to detect at what point on the continuum between the onset of a dispute and the filing of a lawsuit the threat of litigation has advanced from mere possibility or subjective anticipation to contemplated reality." (*Id*. at pp. 34–35.)

The record here shows that the focus of the communications was not on litigation, but rather, on the MCOA board's investigation of allegations of wrongdoing and on the termination of Sher and Lien. There was no evidence demonstrating that the threat of litigation ever advanced beyond a mere possibility. Like the defendants in *Edwards*, defendants here "cannot obtain the benefits of the privilege to protect their own communications merely by establishing that they anticipated a potential for litigation between themselves and [plaintiffs] arising out of some claim or dispute. As discussed, the privilege only arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a *proposed proceeding* that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute." (*Edwards, supra*, 53 Cal.App.4th at p. 39; see also *Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 150 ["section 47(b) does not prop the barn door wide open for any and every sort of

prelitigation charge or innuendo, especially concerning individuals"].) In short, the trial court correctly determined that defendants' evidence was insufficient to establish that the conduct alleged in the eighth and ninth causes of action had a sufficient nexus with proposed litigation or was in furtherance of defendants' access to the courts.

Where the defendant fails to meet the threshold burden to show protected activity, the plaintiff is not required to show a probability of prevailing. (*Gallimore v. State Farm Fire & Casualty Ins. Co., supra,* 102 Cal.App.4th at p. 1396.) Because defendants failed to meet their burden to show that the alleged conduct was protected activity under section 425.16, we need not consider whether plaintiffs established a probability of prevailing.

DISPOSITION

The order denying the motion to strike the eighth and ninth causes of action is affirmed. Plaintiffs are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ